IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHERYL HILL,	§	
	§	
Plaintiff	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-99-3961
FORT BEND	§	
INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Defendant	§	

FINAL SUMMARY JUDGMENT

Pursuant to the memorandum and order signed on this day, the Court

ORDERS that FINAL SUMMARY JUDGMENT is GRANTED on all claims in the above referenced action in favor of Defendant the Fort Bend Independent School District ("the District") against prose Plaintiff Cheryl Hill. Plaintiff shall take nothing and shall bear costs of courts.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas this 19th date of February, 2001.

/s/ Melinda Harmon
United States District Judge

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Plaintiff	§	
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VS.	§	CIVIL ACTION NO.
	§	H-99-3961
FORT BEND	§	
INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Defendant		

MEMORANDUM AND ORDER

Pending before the Court in the above referenced action, alleging employment discrimination based on race (black) and age (currently fifty-three) in the denial of numerous promotions, hostile work environment, and retaliation, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 621 et seg., and of the Age Discrimination in Employment Act ("ADEA"). as amended, 29 U.S.C. §§ 624 et seg., and state law claims of defamation and slander, are Defendant the Fort Bend Independent School District's ("the District's") motion for summary judgment (instrument #52) and motion to strike pro se Plaintiff Cheryl Hill's summary judgment evidence (#61).

In her second amended complaint (#16) and deposition, Plaintiff, a teacher since 1970, was employed by the District since 1989. Initially she taught second grade at the District"

Ridgegate Elementary. In 1990 she applied for and was hired as an instructional specialist at Blue Ridge Elementary. In 1994 she was transferred to Townewest Elementary School to teach English as a Second Language ("ESL"). Plaintiff alleges that from the year before she was hired by the District, when she worked for Lamar Consolidated Independent School District, Defendant has continually refused at first to hire her and then denied her promotions to a number of "administrative positions or advancement positions," [1] has created a hostile work environment, and, since 1994, has retaliated against her with harassment [2] and continual refusals to promote her because she wrote letters of complaint to administrators in the District, filed two charges (April 5, 1999 and March 20, 2000) [3] with the Equal Opportunity Commission.

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[1] Plaintiff received a mid-management administrator certification from the Texas Education Agency in May 1987.

Specifically, she complains that she was denied promotion more than once to such positions as Assistant Principal, English as a Second Language Coordinator, Title I Supervisor, Dean of Instruction, and Reading Specialist.

The District presents evidence that during her deposition, Plaintiff stated that she has been denied at least twenty administrative positions because of her race and/or age. Dep. At 84, Def.'s Ex. A. Plaintiff prepared a summary (Ex. 14) of the administrative positions she claims she applied for in the District since 1992, which Defendant included in its summary judgment evidence and which the Court has used in evaluating Defendant's summary judgment motion.

[2] During her deposition (excerpts attached to Plaintiff's response to motion for summary judgment), Plaintiff identified as instances of retaliatory harassment, other than the denial of promotions, the following: (1) reprimand on March 10, 2000 from assistant principal Dedrick Martin for not giving sufficient ESL time to some students; (2) two letters from principal Cecil Tielke and assistant principal Vicki Johnston, dated February 25, 1997 and March 10, 2000, criticizing her ESL scheduling; (3) a "bad" evaluation because she should have had more "Exceeds" and

("EEOC"), and instituted the instant lawsuit on November 15, 1999. She also asserts a state common-law claim if slander/defamation.

Defendant moves for summary judgment on the following grounds: (1) Some of Plaintiff's claims are precluded because she failed to exhaust administrative remedies or they are tine-barred; (2) Plaintiff cannot establish a Title VII or ADEA violation because she cannot show that she was treated differently from any other applicant for the various positions she sought and there is no evidence that her race or age played a role in the District's decision; (3) she fails to show that her work environment was so permeated with racial/age hostility so as to affect the terms and conditions of her employment sufficiently to qualify as a hostile work environment; (4) Plaintiff cannot demonstrate that Defendant's alleged retaliatory acts were causally linked to her EEOC charges or to her filing of the instant action; and (5) her state law claims for defamation or slandered are barred by sovereign immunity.

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(4) a letter of January 1999 from Tiekle regarding her absences; (5) documented criticism from Johnston for lateness 1997 or 1998; and (6) a 1994 letter from Dianne McDonald, principal of Blue Ridge School at the time, expressing a :difference in philosophy" about a reading program Plaintiff was pursuing as an instructional specialist. Dep. At 49-56; 61-65; 73. When asked if she had ever been reprimanded or disciplined, she responded, "I have been harassed." Id. at 65.

[3] The first EEOC charge alleged that Plaintiff had been denied the opportunity for promotion, because of her race and age, since 1988 "and continuing," most recently for the positions of Second Language Coordinator On November 10, 1998 and summer school Assistant Principal on January 25, 1999.

The second charge alleged retaliation based on her earlier EEOC charge and states that she believes she was "being set up for further

With supporting affidavits, the District points out that its application and job interview procedures include posting of promotional opportunities to provide notice of open positions to inside and outside applicants; a review by multi-member committees to eliminate bias that a single reviewer might; selection of candidates for interview based on criteria listed in the announcement; equal opportunity through a structured interview format, with open-ended questions, written in advance and asked of each applicant, with an opportunity for each interviewee to respond and elaborate to convince the committee of his/her suitability for the position; and no opportunity for a single person to control the screening, interview or evaluation of the applicants. The District further maintains that although Plaintiff applied for and met the basic requirements for the positions that she sought, she, along with others, did not get the jobs because she was not the most qualified applicant. It further emphasizes that many successful candidates for the various positions were black and/or were over forty years of age.

The District contends that many of Plaintiff's claims are time-barred because they were not filed within three hundred days of her first, April 5, 1999 EEOC charge.

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disciplinary action" and that the District's retaliatory acts were "an attempt to build a paper trail to possible not renew my contract and damage my credibility and professional good name." On May 8, 2000, Plaintiff filed an amendment asserting that on May 2, 2000, she received "a Lower evaluation, negative comments and refusal of due process in retaliation for filing a lawsuit in Federal District Court," as well as for the filing of the second EEOC charge.

Copies of all three documents are included in Defendants summary judgment evidence. Depo. Ex. 19, Ex. J, Ex. K.

These claims of nonpromotion, which have a permanence that precludes application of the continuing violation theory, go back to June 1, 1988. Rush v. Scott Specialty Gases, Inc. 113 F.3d 476, 483 (3d Cir. 1997); Weeks v. Coury, 951 F. Supp. 1264, 1270 (S.D. Tex. 1996). Thus all nonpromotion claims prior to June 10, 1998 are time-barred.

Second, the District argues that Plaintiff fails to make a prima facie case of discrimination under either Title VII or the ADEA because she cannot show that she was treated any differently than other similarly situated persons who were outside the protected class. She does not allege that she was denied an equal opportunity to apply for any administrative positions in the District or that she was treated differently from any applicant in the selection process. She was interviewed for some of the positions she sought. She concedes that many of the individuals selected for these positions were black and/or over forty years of age. Pl.'s Depo. At 89-90, 97, 98, 102, 116, 126, 133, 143, 144, 148-49, and 154.

Defendant addresses each position that Plaintiff identified in her complaint as having been denied to her.

Four regular term elementary school assistant principal positions were available for the 1999-2000 school year. Ex. E, Saunders Affidavit. Sixteen applicants, not including Plaintiff, were interviewed. The successful candidates by race and age were a white, age 43; a black, age 26; a Hispanic, age 35; and a black, age 49. Id. Although Plaintiff alleged that she also applied for an assistant principal position in April 1998, the claim is time-barred, as indicated above. Even if it were not, Plaintiff concedes that a black person was given the position. Depo. At 128.

The positions of summer school principals and assistant principals for 1999 were announced and applications were received up until January 12, 1999. Ex. D. Hill Affidavit. More than one hundred people applied, and twenty-three were interviewed. Of those twenty-three, ten were white, three were Hispanic, and ten were black. Id. Plaintiff was not selected for an interview. The successful candidates were made up of four whites and three blacks, ages 40, 43, 47, 51, 52, 53, and 55. Id. The school district, moreover, considers these positions temporary assignments and not promotions. Ex. C. Pedraza Affidavit.

For the search in 1998-99 for the single District position of Coordinator of English as a Second Language, fifteen candidates (six whites, ages 23, 24, 34, 43, 48, and 51; two blacks, ages 29 and 51; six Hispanics, ages 28, 40, 42, 46, 51, and 53; and one Asian, 51) applied. Four applicants, not including Plaintiff, were interviewed, and the successful candidate was white, age 43. Id.

Plaintiff applied for the position of Title I Coordinator in 1997, so any claim based on this application is time-barred. If it were not, summary judgment evidence shows that Plaintiff was interviewed for this job and that the successful candidate was black. Depo. At 123, 126. When Plaintiff was asked why she believed this selection was discriminatory, she stated that it was because the position was reposted and "if you post a job and there are person qualified for the job and you continue to seek other applicants, that is discrimination." Depo. At 128. Defendant insists there is no authority to support such an assumption.

Without identifying when, Plaintiff's complaint asserts that she was denied a promotion to the position of Dean of Instruction. At her deposition she presented a list of twenty

positions that she claimed included every job that she was denied since 1992, but it did not include Dean of Instruction., Depo. Ex. 14, Depo at 85. Thus if she did apply for such a position, it was prior to 1992 and any unpaid claims on it are time-barred, urges the District.

Although Plaintiff admits that Reading Specialist positions are not administrative (Depo. At 112, 154), Defendant additionally maintains that they do not support a nonpromotion claim because they do not involve an increase in pay. Depo. At 236. Plaintiff's response to the motion for summary judgment contends they are "promotional opportunities because they enjoy certain/privileges/benefits that the regular classroom teacher does not inclusive of the increased specialized District paid training, increased visible leadership opportunities, " and paid expenses.

In sum, the District maintains that there is no evidence that Plaintiff's race or age played a role in any of the District's decisions not to promote her to an administrative position. Of the twenty-one administrative positions for which she applied, white candidates filled nine, black candidates filled nine, and Hispanics filled three; fifteen were filled by persons over the age of forty. Out of all the positions Plaintiff claims she was denied, as listed in Depo. Ex. 14, the successful candidates were composed of fifteen whites, eleven blacks, one Hispanic, and one Asian. Plaintiff's own exhibit reflects that twelve of them were forty years old or more, twelve were younger than forty, and four were "younger than I." Depo. Ex. 14.

Even if Plaintiff had made a prima facie case of race and/or age discrimination, the District argues that it has provided legitimate, nondiscriminatory reasons for not promoting Plaintiff, which Plaintiff has not shown to be

pretextual. Plaintiff argues that because she has been a successful and respected educator for many years, she is better qualified for a promotion than an educator with less experience or one who is younger. Depo. At 146, 167-68. The District responds that the number of years an applicant has held a particular certificate or degree and the number of years experience are only two of many factors considered. Exs. C, D, and E, Affidavits of Pedraza, Hill, and Saunders. The District also considers an applicant's academic or technical preparation, certification, experience as it relates to the vacancy, recommendations and references, evaluations, suitability for the positions and professional competence and the District's needs. Ex. C. Pedraza Affidavit. One important factor is that administrators and supervisors must be able to work well with a wide variety of people with divergent interests. The District insists that the evidence reflects the Plaintiff's personal characteristics impede her ability to work will with others. Vicki Johnston, the Townewest principal from January 1999 through August 2000, averred that staff members made numerous complaints about Plaintiff's inability to work with them. Ex. G, Johnston Affidavit. The District provides a copy of "an inflammatory e-mail" that Plaintiff sent to all team leaders about an ESL aide. Depo. Ex. 3. Dedrick Martin, a twenty-six-year-old, black male, named assistant principal at Townewest in July 1999, was informed on his first day by Plaintiff that she had much more experience than he did. Ex. H. Martin Affidavit. Martin further indicated that employees regularly complained about Plaintiff's interpersonal skill. Id. The District observed that during her deposition, Plaintiff referred to Martin as "this boy." Depo. at 230. Furthermore, the various selection committees concluded that Plaintiff was not the most qualified candidate for the position for which she applied. Race and/or age was never a factor in the decision-making process. Exs. C, D, E Affidavits of Pedraza, Hill, and

Saunders. Moreover, as the record reflects, numerous blacks and applicants over forty were promoted.

Nor has Plaintiff shown that the District's articulated, non-discriminatory reasons were pretextual and that it was motivated by discriminatory intent. The District contends that Plaintiff has failed to show that there was a nexus between her race and/or age and its denial of a promotion to her. There is no evidence controverting its insistence that she was not promoted because she was not promoted because she was not the most qualified candidate. All that Plaintiff offers is he subjective belief that Defendant discriminated against her based on her race and/or age. She merely speculates about why she was not chosen for the administrative positions for which she applied: "I have all the qualifications, I'm qualified, and I have the experience, so the inference is if – considering all of that, the inference by the preponderance of the evidence is since I am black, since I am over 40, the inference is it has to do with one of those protected categories." Depo. at 150. See also Id. At 162, 196. Plaintiff admitted during her deposition that she had no documentary evidence demonstrating that the District's refusal to promote her was based on her age or race. Depo. at 160.

Defendant further admonishes that this Court at the pretext stage of the evidentiary framework analysis should not engage in a comparison of Plaintiff's qualifications with those of the successful applicants, absent evidence of a gross disparity. Deines v. Texas Department of Protective and Regulatory Services, 164 F.3d 277, 280 (5th Cir. 1999)

Because it is relevant here, the Court observes that in Deines, recognizing that the Fifth Circuit has previously "held that a plaintiff can take his case to a jury with evidence that

he was clearly better qualified than [other] employees who were selected for the position at issue," the Fifth Circuit wrote,

> ...[W]e recognize that the judicial system is not as well suited by training and experience to evaluate qualifications...in other disciplines as are those persons who have trained and worked for years in that field of endeavor for which the applications under consideration are being evaluated. Thus, unless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field in question.

Id., citing Scott v. Univ. Of Mississippi, 148 F.3d 493, 508 (5th Cir. 1998), EEOC v. Louisiana Office of Community Services, 47 F.3d 1438, 1445 (5th Cir. 1995), and Odum v. Frank, 3 F.3d 839, 847 (5th Cir. 1993). The appellate court further opined that the colloquial expression "jump off the page and slap us in the face" in essence means:

> that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question. This evidentiary standard does not alter the plaintiff's evidentiary burden to prove the fact of intentional

> discrimination by a preponderance of the evidence. Instead, the standard only describes the Character of this particular type of Evidence that will be probative of that ultimate fact.

Id. at 280-281. The District maintains that Plaintiff cannot show such disparity between her qualifications and those of the people selected for the positions at issue.

Nor, insists the District, can Plaintiff demonstrate that she was subjected to a hostile work environment. Instead, she complains only of general harassment. She asserts that unnamed persons in the District have "employed tactics" to "[b]ring Mrs. Hill down professionally," scrutinizing her work, challenging instructional decisions and scheduling, and undermining and discrediting her "professional expertise, knowledge, judgment, and...authority as it relates to...instructional leadership of the English as a Second Language Program..." Plaintiff's Second Amended Complaint at ¶ 6(c) and (d). The District characterizes her allegations as showing that "simply had difficulties working with her supervisors. The primary focus of her complaints is simply a dispute between a supervisor and subordinate over how the specific assigned duties should be performed." Defendant's motion for summary judgment at 20-21. The District contends that Plaintiff cannot demonstrate that the acts she targets were the product of any discriminatory animus. She cannot identify any race or age-related remarks or discriminatory references by any specific individuals. In response to requests at her deposition that she identify acts that made her working environment hostile, she pointed only to a constant request for schedules and constant questions about the ESL program. Depo. at 170-75. When she was

then asked why she believed these requests were based on her age or race, she responded, "I am the only Black ESL teacher at my school." Depo. at 172. She has not shown that she has been subjected to a working environment so permeated with pervasive racial/age hostility as to affect the terms and conditions of her employment. Plaintiff's subjective beliefs alone that she suffered from such discrimination will not support such a claim.

The District, moreover, argues that Plaintiff cannot show that Defendant's alleged retaliatory acts were causally related to Plaintiff's filing of a discrimination charge with the EEOC or her filing of the instant action. The alleged retaliatory conduct by Defendant consists of continuing denial of promotions since 1994, criticism of her reading philosophy in 1992/1994, "employing tactics which exhibit intent and motive ' to bring Mrs. Hill down professionally' by the use of slander/humiliation/disrespect," intense scrutiny of her work, and her "lower" evaluation. Most of these claims are time-barred and are jurisdictionally barred because Plaintiff has not exhausted her administrative remedies regarding them.

On her first EEOC charge of April 5, 1999 (Depo. Ex. 19), Plaintiff did not check the retaliation box and there is nothing in her description of her claim that could be construed as a retaliation claim. In he second charge of March 23, 2000 (Ex. K), she did check the retaliation box and stated that she was retaliated against for filing the first charge. The second charge expressly asserted that Martin counseled her on March 9, 2000, gave her a warning letter on March 9-10, 2000, and presented her with an "unofficial draft ESL matrix" on March 20, 2000. In her May 2, 2000 amendment (Ex. K), she complained of the "lower" evaluation with negative comments. Because an EEOC charge must be filed within

300 days of the alleged unlawful act or the claims is time-barred, all the retaliation claims that occurred prior to May 30, 1999 in the second charge are time-barred. Plaintiff also failed to exhaust her administrative remedies as to all Title VII and ADEA retaliation claims not asserted in the second charge or its amendment.

Furthermore, the District asserts, for any claims that are not time-barred or not administratively exhausted, she cannot establish a prima facie case of retaliation because she cannot show that the protected conduct was a "but for" cause of Defendant's adverse employment action. Most of the actions identified by Plaintiff as retaliatory do not qualify as adverse employment actions or ultimate employment decision under Fifth Circuit law interpreting the statutes. Furthermore, even if she could show that the protected conduct was a "a substantial element" in the District's decision to take an adverse action against her, the employer is not liable for unlawful retaliation where the employer would have taken the same action "even in the absence of the protected conduct." Long v. Eastfield College, 88 F.3d 300, 305 n.4 (5th Cir. 1996). The District contends that Plaintiff cannot show that it would not have taken the challenged actions had Plaintiff not filed the discrimination charges.

Later, the District argues that Plaintiff's state-law claims fail as a matter of law because they are barred by sovereign immunity. While the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001 et seq., waived sovereign immunity to a limited degree, the waiver school districts is restricted to claims arising from accidents involving the operation or use of motor-driven vehicles. Tex. Civ. Prac. & Rem. Code Ann. § 101.051; Leleauax v. Hamshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992); Williams v. Conroe Indep. Sch. Dist., 809 S.W.2d 954, 957

(Tex. App.—Beaumont 1991, no writ). None of Plaintiff's tort claims relates to use of a motor vehicle.

In response, Plaintiff addresses only two points argued by Defendant. First, she asserts that the limitations bar does not apply because she has alleged a continuing violation in the pattern and Defendant's policy of discriminatory denial of promotion or advancement opportunities. Second she argues that the retaliatory acts are causally related to her actions taken to protect her statutory rights because she wrote letters to the superintendent and to he board members from which the EEOC could reasonably infer that the continues denial of promotions resulted from her internal complaints. Her response is filled with conclusory allegations, and her summary judgment evidence is largely incompetent.

The District has moved to strike Plaintiff's summary judgment evidence because her affidavits are not in correct form, letters are not verified, contain hearsay, are conclusory or matters of opinion, and not based on personal knowledge, the source of her charts is not identified, her letter of reference are not properly authenticated and lack the requisite foundation, as well as are based on opinion and subjective belief rather than personal knowledge and on hearsay, and her resume, teacher certificate and appraisals have not been properly authenticated. The Court agrees with many of Defendant's charges. Nevertheless, in deference to her pro se status, the Court has read the evidence carefully to determine if Plaintiff provides any evidence raising a genuine issue of material fact on her claim where the deficiencies in the admissibility of the evidence could be cured.

The District's reply to Plaintiff's response emphasizes Plaintiff's failure to address many of the District's arguments, misinterprets the law on continuing violations, relies on vague

and sweeping allegations about people in various administrative positions and fails to satisfy her evidentiary burden on the retaliation claims. The District maintains that it has established that Plaintiff did not suffer any adverse employment action because of her age or race, and she has failed to produce any controverting evidence to raise a genuine issue of material fact for trial on her Title VII and ADEA claims. Nor has she offered any evidence demonstrating that she was subjected to a hostile working environment that affected the terms and conditions of her employment. Furthermore, she has not shown that her state-law claims are not barred by the doctrine of sovereign immunity.

The movant seeking a federal summary judgment initially must inform the court of the basis for its motion and point out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file that demonstrate the absence of a genuine issue of material fact and show that it is entitled to a judgment as a matter of law . Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrett, 477 U. S. 317, 323 (1986). The movant need not negate the opposing party's claims nor produce evidence showing an absence factual issue, but may rely on the absence of evidence to support essential elements of opposing party's claims. International Assoc. of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., 812 F.2d 219, 222 (5th Cir. 1987).

The burden then shifts to the non-movant to set forth specific facts and competent summary judgment evidence to raise a genuine issue on material fact on each essential element of any claim on which he bears the burden of proof at trial. Fed. R. Civ. P.56 (c). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party may not rest on mere allegations or denials in its pleadings, but must produce affirmative evidence and specific facts. Anderson, 477 U.S. at 256-57. She meets this burden only if he shows that "a reasonable jury could return a verdict for the non-moving party." Id. At 254. A mere scintilla of evidence will not preclude granting of a motion for summary judgment. Id. At 252.

All reasonable inferences must be drawn in favor of the non-moving party. Matsushita Electric Industrial Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574. 587-88 (1986), citing United States v. Diebold, 369 U.S. 654, 655 (1962). Once the burden of proof has shifted to the non-movant, she "must do more that simply show that there is some metaphysical doubt as to the material facts." Id. At 586. Instead she must produce evidence upon which a jury could reasonably base a verdict in his favor. Anderson, 477 U.S. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id., 477 U.S. at 249-50. Moreover, the non-movant must "go beyond the pleadings and by her own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A., 139 F.3d 532, 536 (5th Cir. 1998). Unsubstantiated and subjective beliefs and conclusory allegations and opinions are not competent summary judgment evidence. Grimes v. Texas Dept. of Mental Health and Mental Retardation, 102 F.3d 137, 139-40 (5th Cir. 1996); Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 506 U.S. 825 (1992).

The non-movant cannot discharge her burden by offering vague allegations and legal conclusions. Salis v. Carpenter, 908 F.2d 299, 305 (5th Cir. 1992); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990).

Pleadings are not summary judgment evidence. Wallace v. Texas Tech University, 80 F.3d 1042, 1046 (5th Cir. 1996), citing Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (enbanc).

The district court is not required by Rule 56 to sift through the record in search of evidence to support a party's opposition to summary judgment. Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998), citing Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915-16 & n.7 (5th Cir.), cert. denied, 506 U.S. 832 (1992).

The filing of an administrative complaint with the EEOC to allow it an opportunity to investigate discriminatory practices and seek voluntary compliance and conciliation is generally a jurisdictional prerequisite under Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); Patterson v Mclean Credit Union, 491 U.S. 164, 180-81 (1989); Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995). Judicial review is restricted to a plaintiff's timely filed EEOC charges or the investigation reasonably expected to grow out of the charges. Vuyanich v. Republic National Bank of Dallas, 723 F.2d 1195, 1202 (5th Cir. 1984).

Furthermore, in Texas a plaintiff must file his EEOC charge within three hundred days of the occurrence of the alleged unlawful employment action. Griffin v. City of Dallas, 26 F.3d 610, 612 (5th Cir. 1994). Even though the relevant statute, 42 U.S.C. § 2000e-5 (e) (1), states that the discrimination charge must be filed within 180 days of the

alleged unlawful employment practice, it allows a plaintiff who has instituted proceedings with a state or local agency authorized to grant or seek relief from such practices an extension of the limitations period for filing an EEOC charge to 300 days. Id. The Fifth Circuit has held that "the requirements that person aggrieved must initially institute proceedings with the state referral agency is met by the EEOC's routine transmittal of a copy of the complaint to the state referral agency" pursuant to a worksharing agreement the EEOC and the Texas Commission on Human Rights. Urrutria v. Valero Energy Corp., 841 F.2d 123, 125 (5th Cir. 1998); Id. at 162. The EEOC routinely transmits a copy of a complaint to the Texas Commission on Human Rights, the Texas referral agency, so the default limitations period here, because for this reason Texas is a "deferral state," is three hundred days. Griffin, 26 F.3d at 612-13; Messer v. Meno, 130 F.3d 130, 134 & n.2 (5th Cir. 1997), cert. denied sub nom. Texas Educ. Agency v. Messer, 119 S. Ct. 794 (1994).[4]

Timely filing of a charge with the EEOC is a prerequisite for suit under Title VII. United Airlines, Inc. v. Evans, 431 U.S. 553, 555 n.4 (1977); Abrams v. Baylor College of Medicine, 805 F.2d 528, 532 (5th Cir. 1986). See also Barrow v. New Orleans S.S. Ass'n, 932 F.2d 473, 476-77 (5th Cir. 1991) ("If an EEOC charge is untimely filed, a suit baesd upon the untimely charge should be dismissed."); Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241, 249 (5th Cir. 1980) ("A past act of discrimination for which a party did not file a charge of discrimination.

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[4] This federal-state cooperation under the Worksharing Agreement does not extend to exhaustion of remedies. The Fifth Circuit recently held that a former employee failed to exhaust his state administrative remedies for a claim under the Texas Commission on Human Rights Act where he received a right to sue letter from the EEOC, but not one from the Texas Commission on Human Rights. Jones v. Grinnell Corp., ___ F.3d ___, 99-10402, 2001 WL 710 (5th Cir. Jan. 4, 2001).

to a discriminatory act that occurred before the enactment of Title VII."). The cause of action for the filing of an EEOC charge accrues on the date the act occurs, not at the time that the plaintiff becomes aware that an act was discriminatory. Delaware State College v. Ricks, 449 U.S. 250, 258 (1980); Merrill v. Southern Methodist Univ., 806 F.2d 600, 605 (5th Cir. 1986).

Thus as a prerequisite to filing suit under Title VII in Texas, a plaintiff must file a charge of discrimination with the EEOC within three hundred days after learning of the alleged illegal discriminatory conduct. 42 U.S.C. § 626 (d) (2) ; Conaway v. Control Data Corp., 955 F.2d 358, 362 & n.3 (5th Cir. 1992), cert. denied, 506 U.S. 864 (1992); Clark v. Resistoflex Co., 854 F.2d 762, 765 (5th Cir. 1988). Once a plaintiff receives a right to sue letter from the EEOC, a final agency action, permitting him ninety days to file suit to safeguard his claim, because he has had adequate notice, he must do so diligently, and equitable tolling does not apply. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984).

An equitable exception to this statutory limitations period, the continuing violation doctrine was recognized by the Fifth Circuit in Berry v. Board of Supervisors, 715 F.2d 971 (5th Cir. 1983); Huckaby v. Moore, 142 F.3d 233, 238 (5th Cir. 1998). Under the doctrine, the plaintiff need show more than a series of related acts, one or more of which falls within the limitations period; he must demonstrate "an organized scheme leading to and including that present violation...such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, that gives rise to the cause of action [citations omitted]." Id. at 238; Glass v. Petro-Tex Chem. Corp., 757 F.2d 1554, 1560-61 (5th Cir. 1985).

> The core idea of the continuing violations theory, however, is that equitable considerations may very well require that the filing periods not begin to run until the facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated. The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights. At the same time, the mere perpetuation of the effects of time-barred discrimination does not constitute a violation of Title VII in the absence of independent actionable conduct occuring within the statutory period. Thus a plaintiff can avoid a limitations bar for an event that fails to fall within the statutory period where there is a persisting and continuing system of discriminatory practices in promotion or transfer that produces effects that may not discriminatory except in cumulation over a period of time.

Huckaby, 142 F.3d at 238-39, citing Glass, 752 F.2d at 1560. Factors to be considered include whether "the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation," whether the alleged acts are "recurring...or more in the nature of an isolated work assignment or employment decision," and perhaps most important, whether "the act [has] the degree of permanence that should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being

dependent on a continuing intent to discriminate." Huckaby, 142 F.3d at 239; Berry, 715 F.2d at 981. In other words, under the continuing violation theory, "equitable considerations may very well require that the filing periods not begin to run until facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated." Webb v. Cardiothoracic Surgery Associates of North Texas, P.A., 139 F.3d 532, 537 (5th Cir. 1998). Demotions, suspensions, discharges, failures to promote and other adverse actions that had material and obvious effect on an individual's employment status are discrete acts to which the continuous violation doctrine does not apply. Huckaby, 142 F.3d at 239. With respect to the Berry/Huckaby permanence factor, the Fifth Circuit has clearly distinguished a denial of promotion from a hostile work environment/continuing violation claim,

> Acts of harassment that create an offensive or hostile environment generally do not have the degree of permanence as, for example, the loss of promotion. If the person harassing a plaintiff leaves the job, the harassment ends; the harassment is dependent on a continuing intent to harass. In contrast, when a person who denies a plaintiff's promotion leaves, the plaintiff is still without a promotion even though there is not longer any intent to discriminate. In this latter example, there is an element of permanence to the discriminatory action, which should, in most cases, alert a plaintiff that her rights have been violated.

Waltman v. International Paper Co., 875 F.2d 468, 476 (5th Cir. 1989).

Furthermore, the filing of an administrative complaint with the EEOC to allow it an opportunity to investigate discriminatory practices and seek voluntary compliance and conciliation is generally a jurisdictional prerequisite under Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); Patterson v. Mclean Credit Union, 491 U.S. 164, 180-81 (1989); Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995). Judicial review is restricted to a plaintiff's timely filed EEOC charges or the investigation reasonably expected to grow out of the charges. Vuyanich v. Republic National Bank of Dallas, 723 F.2d 1195, 1202 (5th Cir. 1984). "In this circuit, a district court may only consider those grounds of a Title VII complaint that were raised in the administrative process." Anderson v. Lewis Rail Service Co., 868 F.2d 774, 774 (5th Cir. 1989).

To prevail on her race and age discrimination claims, Plaintiff must show that she was treated differently from similarly situated individuals because of her race and age. Willingham v. Macon Tele. Publishing Co., 507 F.2d 1084, 1088 (5th Cir. 1975).

If the plaintiff lacks direct evidence of discrimination, plaintiff asserting a claim for a discriminatory failure to promote under Title VII must initially use circumstantial evidence to make a prima facie case by showing by a preponderance of the evidence that (1) she was a member of the protected class, (2) she was qualified for the position sought, (3) that she was not promoted, i.e., suffered an "adverse employment action," [5] and (4) that after the denial of promotion the desired position was filled by the employer with a non-minority person or one under forty. Mcdonnell Douglas Corp. v. Green, 411 U.S. 702, 802 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248,

254 (1981); Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 818 (5th Cir. 1982), cert. denied, 459 U.S. 1038 (1982).

Once a plaintiff has made out a prima facie case of employment discrimination, a presumption arises that the employer unlawfully discriminated against the employee and the burden of production (but not the ultimate burden of persuasion, which remains throughout with the plaintiff) shifts to the defendant. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). With some admissible evidence that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the reason for the adverse employment action, the defendant employer must articulate a legitimate, nondiscriminatory reason for the adverse employment action it took against the plaintiff which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. Id. at 507. If the defendant succeeds, the presumption of unlawful discrimination raised by the prima facie case disappears and the burden of production shifts back to the plaintiff to prove by a preponderance of the evidence and with a "heightened level of specificity" that the proffered reason is mere text. St Mary's Honor Center, 509 U.S. at 507 (1993); Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995). There must be evidence to show that the employer's reason is not worthy of credence; a mere shadow of a doubt is not sufficient. EEOC v. Louisiana Office of Community Services, 47 F.3d 1438, 1443-44 (5th Cir. 1995). A unanimous Supreme Court has recently held that a plaintiff's prima facie case combined with sufficient evidence for a reasonable factfinder to reject as pretext the employer's nondiscriminatory reason for its adverse decision may be sufficient to sustain a finding of liability for intentional discrimination without further evidence of intentional discrimination. Reeves v. Sanderson Plumbing Products,

Inc., 530 U.S. 133 (2000); Vadie v. Mississippi State University, 218 F.3d 365, 374 n.23 (5th Cir. 2000), cert. denied, No. 00-806, 2001 WL 32522 (Jan. 16, 2001).

Conclusory allegations, unsubstantiated assertions and subjective beliefs are not sufficient to support a discrimination claim. Grimes v. Texas Department of Mental Health and Mental Retardation, 102 F.3d 137, 139 (5th Cir. 1996); id. at 1448 (holding that an employee's subjective belief of discrimination alone will not warrant judicial relief).

Although initially developed with respect to sexual discrimination, the hostile work environment cause of action applies to any protected class under Title VII, including race. Walker v. Thompson, 214 F.3d 83 (5th Cir. 2000). The language of 42 U.S.C. § 2000e-2 (a) (1), making it "an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." "evinces a congressional intent, 'to strike at the entire spectrum of disparate treatment of men and women' in employment, " which includes requiring people to work in a discriminatory hostile or abusive environment. Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 64 (1986). See also Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 593 (5th Cir. 1998), rehearsing en banc granted and op. Vacated, Williams v. Wal-Mart Stores, Inc., 169 F.3d 215 (5th Cir. 1999), op. Reinstated on rehearing except for Part IIC on Punitive damages, 182 F.3d 333 (5th Cir. 1999). Noting the wording of § 2000e-2 (a) (1), the United States Supreme Court has clearly stated that the scope of Title VII's prohibition is not limited to "economic" or "tangible employment action" (e.g., a discharge, demotion, undesirable reassignment, or failure to

receive an increase or bonus) discrimination.[6] Faragher v. City of Boca Raton, 118 S. Ct. at 2282 (1998), citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986), and Oncale v. Sundowner Offshore Services, Inc. 523 U.S. 75, ___ 118 S.Ct. 998, 1001 (1998). Covering more that "'terms and conditions' of employment in the narrow contractual sense," TitleVII reaches harassment "so severe or pervasive" as to "alter the conditions of [the victim's] employment and create an ebusive working environment.'" Id. Indeed, "Title VII was only meant to bar conduct that is so severe or percasive that it destroys a protected class member's opportunity to succeed in the workplace." Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 194 (5th Cir. 1996), cert. denied, 117 S. Ct. 682 (1997).

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5 "Adverse employment actions" have been defined by the Fifth Circuit to include formal reprimands, demotions, discharges, refusals to hire, and refusals to promote. Benningfield v. City of Houston, 157 F.3d 369, 377 (5th Cir. 1998), cert. denied, 526 U.S. 1065 (1999); Pierce v. Texas Dep't of Crim. Justice, Inst. Div., 37 F.3d 1146, 1149 (5th Cir. 1994). "[A] plaintiff's subjective perception that a demotion has occurred is not enough" to constitute an adverse employment decision. Forsyth v. City of Dallas, 91 F.3d 769, 774 (5th Cir. 1996).

6 A tangible employment action" requires an official act of the enterprise, a company act" such as hiring, firing, failing to promote, reassignment with significantly different responsibilites, or a decision causing a significant change in benefits." Burlington Industries, Inc. v. Ellerth, 514 U.S. 742, ___, 118 S. Ct. 2275, 2268-68 (1998).

To demonstrate subjection to a hostile or abusive work environment based on race or age, a plaintiff must demonstrate (1) that she belongs to a protected group, here African American or over forty years of age, (2) that she was subjected to unwelcome harassment, (3) that the harassment was based on race and/or age, (4) that the harassment affected a term, condition, or privilege of her employment, and (5) that the employer knew or should have known about the harassment and failed to take prompt remedial action. DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir. 1995), cert. denied, 116 S. Ct. 367 (1995). The court should examine the totality of the circumstances in determining if an environment is hostile, including the following: the frequency and severity of the discriminatory conduct; whether the conduct was physically threatening or humiliating or merely an offensive utterance; and whether the conduct unreasonably interfered with the employee's work performance. Harris v. Forklift Systems, Inc. 510 U.S. 17, 114 S. Ct. 367, 371 (1993). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive working environment... is beyond Title VII's purview." Id. at 370. To constitute a hostile work environment where there is no "tangible" adverse employment decision, "the workplace must be permeated with 'discriminatory intimidation, ridicule, and insult' that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment." Id., quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986); Indest v. Freeman Decorating Inc., 164 F.3d 258, 264 (5th Cir. 1999), concurring op., 168 F.3d 975 (5th Cir. 1999). To survive summary judgment, Plaintiff must "create a fact on each of the elements of a hostile work environment claim: (1) racially discriminatory intimidation, ridicule and insults that are; (2) sufficiently severe or pervasive that they; (3) alter the conditions of employment; and (4) create an abusive working

environment." Walker, 214 F.3d at 625.

To make out a prima facie case of retaliation under Title VII, 42 U.S.C. § 2000e-3 (a), a plaintiff must demonstrate (1) that she engaged in an activity protected by Title VII, (2) the employer took an adverse employment action against her, and (3) there was casual connection between the protected activity and that adverse reaction. Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1092 (5th Cir. 1995). An employee has engaged in activity protected by Title VII if shse has "opposed any practice made an unlawful employment action" by Title VII or if she has "made a charge, testified, assisted, or participated in any manner of investigation, proceeding, or hearing" under the statute. 42 U.S.C. § 2000e-3 (a).

Summary judgments are appropriate in age discrimination cases where Plaintiff fails to carry her burden of demonstrating discriminatory treatment. See, e.g., Bodenheimer v. PPG Indus., 5 F.3d 955 (5th Cir. 1993); Moore v. Eli Lilly & Co., 990 F.2d 812, 819 (5th Cir.), cert. denied, 114 S. Ct. 467 (1993).

Where there is no direct evidence of age discrimination, the same evidentiary procedure for allocating burdens of proof applies to discrimination claims under the ADEA and under Title VII. Meinecke v. H&R Block of Houston, 66 F.3d 77, 83 (5th Cir. 1995); Bodenheimer v. PPG Indus. Inc., 5 F.3d 955, 957 n.4 (5th Cir. 1993). In a suit for age discrimination, the plaintiff must first establish by a preponderance of the evidence a prima facie case of discrimination.[7] If the plaintiff succeeds, the prima facie cases raises a resumption of discrimination. The defendant must then articulate, but need not prove, that the discharge was based on a legitimate, non discriminatory reason for the termination. Defendant is not required to prove that it was actually motivated by these

proffered reasons, nor must it demonstrate an absence of discriminatory motive. If the employer succeeds, the plaintiff must then prove by a preponderance of the evidence that the reasons are pretextual and that the discharge was motivated by intentional age discrimination. In Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) (en banc), the Fifth Circuit held that a plaintiff in an ADEA disparate treatment case must offer evidence to rebut each of the employer's articulated reasons for its action. The Fifth Circuit stated that in conjunction with the prima facie case, that rebuttal would often allow a finding of discrimination without additional evidence to avoid summary judgment if the evidence, taken as a whole, created a fact issue about actual motivation and creates a reasonable inference that age was a determinative

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7 To establish a prima facie case of intentional age discrimination, a plaintiff must show that (1) she was discharged; (2) she was qualified for the position; (3) she was within a protected class (over the age of forty) at the time of the discharge; and (4) she was either replaced by someone younger, or otherwise discharged because of her age. Bodenheimer, F.3d at 957. The United States Supreme Court has made clear that, in assuming that the evidentiary burden of McDonnell Douglas, 411 U.S. at 802, applies to an ADEA case, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of a prima facie case under the ADEA. O'Connor v. Consolidated Caterers Corp., 517 U.S. 308, 313 (1996). While only those forty years older are protected by the ADEA, it prohibits age discrimination against them not on the basis of class membership but on age. Thus if one member of the class loses out to another member of the class, that fact is irrelevant as long as the first lost out because of her age. Id. Courts have held that a five-year difference between an employee and her replacement is insufficient as a matter of law to create an inference of discrimination. Cramer v. Intelidata Techs. Corp. No. 97-2775, 1998 WL 911735, at *3 (4th Cir. Dec. 31, 1998); Bush v. Dictaphone Corp., 161 F.3d 363, 368 (6th Cir. 1998). This Court concludes that two years is not a substantial difference justifying an inference of age discrimination.

factor in the adverse employment decision. Id. at 994. Nevertheless if that evidence taken as whole would not allow a jury to infer that the actual reason for the discharge was age discrimination, the employer would not be entitled to summary judgment. Id. For instance, if one of the employer's reason is questionable, that fact may not suffice to cast doubt on the remaining reasons. Id. See also EEOC v. Texas Instruments, Inc., 100 F.3d 1173, 1180 (5th Cir. 1996). Although the burden of production shifts, the plaintiff slways retains the ultimate burden of persuasion that there is a nexus between his termination and his age. St. Mary's Honor Center v. Hicks, 113 F.3d 839, 850 (5th Cir. 1993). While age does not have to be the only reason for an adverse employment decision, it must be factor in the employer's decision and have a determinative influence on the outcome. Woodhouse v. Magnolia Hospital, 92 F.3d 248 (5th Cir. 1996).

After reviewing the record and the applicable law, the Court concluded that Defendant's motion for summary judgment should be granted.

First, all claims prior to June 10, 1998, which is three hundred days prior to the filing of Plaintiff's first EEOC charge, are time-barred. The continuing violation theory does not apply to denials of promotions, which are discrete acts with a permanence that should have alerted Plaintiff to act to protect her rights. Huckaby, 142 F.3d at 239.

First, all claims prior to June 10, 1998, which is three hundred days prior to the filing of Plaintiff's first EEOC charge, are time-barred. The continuing violation theory does not apply to denials of promotions, which are discrete acts with a permanence that should have alerted Plaintiff to act to protect her rights. Huckaby, 142 F.3d at 239.

Second, Plaintiff's race and age discrimination claims under Title VII and the ADEA fail because she fails to show that she was treated differently than other similarly situated individuals. Defendant has shown with uncontroverted evidence that quite a number of the successful applicants for promotions that were sought by Plaintiff were black and/or over forty years of age. Although Plaintiff speculates that her age or race must have been responsible for her not getting all the promotions because, in her opinion, she was qualified for the positions because, in her opinion, she was qualified for the positions, she presents no evidence that she was more qualified than any of the successful candidates or that they were less qualified or unqualified. Plaintiff also submits no other evidence that the District's articulated, legitimate, nondiscriminatory reasons for its selections of others were pretextual.

Plaintiff has also failed to raise a genuine issue of material fact relating to her hostile work environment claim. None of the acts that she targets (e.g., constant requests for schedules or questions about the ESL plan or vague, generalized allegations that people have discredited her professional abilities) are sufficient as a matter of law to constitute an abusive environment where racial aor age-related harassment was so severe or pervasive as to destroy her opportunity to succeed in employment with the District. Indeed, she provides no evidence of intimidation, ridicule or insults based on race or age, no less such that were sufficiently severe as to affect a term, condition or privilege of her employment.

With respect to her retaliation claim, she fails to show evidence of any casual connection between her filing of the EEOC charges or this suit and the District's denial of any promotions.

The Court agrees with Defendant that Plaintiff's defamation/slander claim for monetary damages is barred by sovereign immunity.

For the reasons indicated above, the Court

ORDERS that Defendant's motion to strike is DENIED and its motion for summary judgment is GRANTED on all claims.

SIGNED at Houston, Texas, this 19th day of February, 2001.

/s/ Melinda Harmon
United States District Judge